

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

Spanenberg
PC-I

FILE: B-218620.2

DATE: February 6, 1986

MATTER OF: Raytheon Ocean Systems Company

DIGEST:

1. Protest that conduct of discussions with awardee constituted technical leveling, technical transfusion and improper auction techniques is timely if filed within 10 working days of when the protester became aware of the results of such discussions.
2. GAO will consider, in camera, relevant but sensitive documents concerning an on-going procurement action that were submitted to GAO, but not the protester, although this limits GAO's discussion of the contents of such documents.
3. An agency, during discussions, requested additional information or justification from an offeror concerning a technically complex item that is being procured for the first time and noted instances where the proposal was not in accordance with the RFP requirements. This was not improper coaching with the intent of bringing the offeror's proposal up to the protester's level, i.e., technical leveling, in violation of FAR, 48 C.F.R. § 15.610(d)(1), even though the offeror, which had initially been found technically unacceptable, modified its design in its revised proposal during discussions such that its proposal was found acceptable and the protester's proposal was always considered acceptable.

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4. Where the record reveals no evidence that the agency conveyed to an offeror, either directly or indirectly, during discussions a better technical approach or the protester's technical approach, improper technical transfusion has not been shown.
5. GAO cannot conclude improper auctioning techniques were employed during discussions, where price negotiations had not been held when the protest was filed; the record does not demonstrate that the offerors were aware of each other's specific prices; and the agency denies the disclosure of pricing information.
6. A revised proposal, which incorporated design changes which were normal revisions made during the conduct of negotiations, is not considered an unacceptable late proposal or modification.

Raytheon Ocean Systems Company (ROSC) protests certain actions of the Naval Air Development Center, Department of the Navy (Navy), on request for proposals (RFP) No. N62269-85-R-0320 for the supply of electrographic recorders. ROSC protests that the Navy's discussions with another offeror, EDO Corporation, Western Division (EWD), which had initially been found technically unacceptable by the Navy, constituted technical leveling, technical transfusion and improper auction techniques in violation of the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.610(d)(1), (2) and (3) (1984), respectively. ROSC also protests that the EWD revised technical proposal should be rejected as a "late proposal or modification," and that the Navy's actions have caused increased costs to the government and ROSC in violation of the purpose and intent of the Competition in Contracting Act of 1984 (CICA). We deny the protest.

Three proposals were received in response to the RFP on February 25, 1985. One of the proposals was found technically unacceptable. On March 13, 1985, additional technical information was requested from the two remaining offerors, ROSC and EWD. This information was submitted by March 20, 1985. On May 3, 1985, the Navy found EWD's proposal technically unacceptable and, on May 13, 1985, the Navy executed a

letter contract with ROSC as the only acceptable offeror. On May 14, 1985, EWD protested to our Office the Navy's selection of ROSC without further discussions. On June 18, 1985, the Navy reversed its position in response to the EWD protest, reopened discussions with EWD and ROSC, and issued an amendment to the RFP clarifying and changing certain specification requirements. After further discussions, the Navy apprised ROSC on October 10, 1985, that EWD's revised proposal was technically acceptable and that best and final price proposals were requested. ROSC's protest followed on October 17, 1985.

The Navy and EWD argue that ROSC's protest concerning Navy discussions with EWD is untimely filed under our Bid Protest Regulations, since it was filed more than 10 working days after June 18-20, 1985, when ROSC was apprised that the Navy intended to reopen discussions with EWD. In this regard, ROSC, in its June 10, 1985, comments on EWD's protest, stated, among other things, that allowing EWD to reenter the competition would violate the FAR, 48 C.F.R. § 15.610(d), constraints on discussions. Also, ROSC states that it verbally cautioned the Navy on June 20, 1985, regarding the prohibitions contained in that regulation against technical leveling and technical transfusion with regard to the proposed discussions with EWD.

We believe that the Navy and EWD misconstrue the nature of ROSC's protest. ROSC has not protested the fact that further discussions were conducted; rather, ROSC is protesting the content of the discussions. Contrast Sperry Corp., B-219596, Oct. 16, 1985, 85-2 C.P.D. ¶ 415 (protest of determination to reopen discussions). In June, ROSC could only speculate about the content of the additional discussions to be conducted with EWD and a protest then may well have been premature. Under the circumstances, ROSC could reasonably wait until it learned the results of the discussions with EWD before it protested their conduct. Therefore, ROSC's protest is considered timely under our Bid Protest Regulations.

The Navy has not furnished ROSC a copy of its detailed response to the allegations concerning its discussions with EWD because this is an ongoing procurement and the response necessarily reveals many of the details of EWD's proposal. Moreover, the Navy has cautioned our Office against revealing sensitive information that may adversely affect

the procurement process or EWD's proprietary rights. ROSC questions the propriety of the Navy actions since best and final price proposals have been received and there is no indication that further discussions are contemplated.

The Competition in Contracting Act of 1984, 31 U.S.C.A. § 3553(f) (West Supp. 1985),^{1/} provides in pertinent part that:

"Within such deadlines as the Comptroller General prescribes, upon request each Federal Agency shall provide to an interested party any document relevant to a protested procurement action (including the report required by subsection (b)(2) of this Section) that would not give the party a competitive advantage and that the party is otherwise authorized by law to receive."

While the information concerning the conduct of discussions may not be released to the protester, GAO has reviewed, in camera, the documents supplied in light of the protest issues raised. Our discussion of the documents is necessarily limited in view of the foregoing. Maxima Corp., B-220072, Dec. 24, 1985, 85-2 C.P.D. ¶ 708.

On January 14, 1986, ROSC told our Office that it believed there were certain documents with direct bearing on the protest that were not supplied by the Navy to our Office or ROSC. ROSC identified these documents as those of the Technical Review Committee, which reviewed ROSC's and EWD's proposals, which recognized that technical leveling/technical transfusion had occurred. We immediately requested the documents of the Technical Review Committee from the Navy, which supplied them on January 24, 1986. All but one of the documents were supplied in camera to our Office. We considered these documents in making this decision.

10 U.S.C. § 2304(g) (1982)^{2/} required that oral or written discussions be held with all offerors in the

^{1/} Bid protest provisions of the Competition in Contracting Act of 1985 (CICA) are applicable to protests filed on or after January 15, 1985.

^{2/} The statute applicable to procurements issued prior to March 31, 1985, the effective date of CICA's procurement provisions.

competitive range. We have recognized that this mandate can be satisfied only by discussions that are meaningful. Ford Aerospace & Communications, Corp., B-200672, Dec. 19, 1980, 80-2 C.P.D. ¶ 439. In order for discussions to be meaningful, agencies must point out weaknesses, excessiveness, or deficiencies in proposals unless doing so would result in disclosure of one offeror's approach to another offeror (technical transfusion) or would result in technical leveling. Joule Engineering Corp.--Reconsideration, 64 Comp. Gen. 540 (1985), 85-1 C.P.D. ¶ 589.

In this case, after written discussions with ROSC and EWD, EWD was found technically unacceptable for 11 reasons that were communicated to EWD. EWD protested the legitimacy and propriety of each of the 11 reasons. Consequently, the Navy reevaluated its position and determined that further discussions with EWD regarding this technically complex item being procured for the first time were necessary, even taking into account potential charges by ROSC and internal concerns by the Technical Review Committee of technical leveling. This determination was based upon the Navy's belief that the discussions with EWD may not have been fair or meaningful, even though EWD had inadequately responded to the Navy's initial questions regarding its proposal and ROSC had adequately responded. In this regard, the deficiencies relied upon in determining that EWD was technically unacceptable were based on (1) the Navy's admitted failure to adequately depict its requirements in the RFP; (2) informational deficiencies where it was not completely unreasonable for EWD to have failed to provide the desired information; and (3) deficiencies of a minor nature. Additionally, the Navy was concerned that only ROSC was determined acceptable after the initial discussions--a situation subject to close scrutiny by our Office. Comten Compress, B-183379, June 30, 1975, 75-1 C.P.D. ¶ 400.

The content and extent of meaningful discussions in a given case are matters of judgment primarily for determination by the agency involved. Stewart & Stevenson Services, Inc., B-213949, Sept. 10, 1984, 84-2 C.P.D. ¶ 268. If an agency in good faith determines that proper discussions were not conducted and, as a result, further negotiations are warranted, the agency, in our view, has established a sufficient reason to conduct further discussions. Our Office will only question an agency's determination in this

regard upon a showing that the agency's decision is fraudulent or so grossly erroneous as to imply bad faith. Sperry Corp., B-219596, Oct. 16, 1985, 85-2 C.P.D. ¶ 415.

Recognizing the discretion involved, ROSC does not protest the Navy's determination to hold further discussions, although ROSC had previously expressed concern that such actions could lead to improper technical leveling. Instead, ROSC protests that the discussions with EWD as conducted constituted (1) technical leveling; (2) technical transfusion; and (3) use of auction techniques in violation of FAR, 48 C.F.R. § 15.610(d)(1), (2) and (3), respectively.

Technical leveling in discussions is prohibited by FAR, § 15.610(d)(1), and is defined as helping an offeror bring its proposal up to the level of the other proposals through successive rounds of discussions, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence or inventiveness in preparing a proposal. See 51 Comp. Gen. 621 (1972); E-Systems, Inc., B-191346, Mar. 20, 1979, 79-1 C.P.D. ¶ 192.

When negotiations were reopened with EWD on June 18, 1985, the Navy addressed a series of detailed written questions regarding EWD's offered product and proposal. The queries of the Navy requested information or justification for EWD's technical approach and noted instances where the EWD proposal was not in accordance with the RFP requirements as amended. The Navy also requested EWD to address the matters that were clarified or changed by the RFP amendment that was issued with the questions. EWD responded to the questions and revised its proposal to modify its design. Some members of the Technical Review Committee characterized the design modification as "rather extensive changes to the hardware design." The EWD responses and modified design engendered an additional set of written discussions and questions by the Navy. These discussions were required to adequately evaluate the EWD proposal documentation, so the Navy could better understand and gain confidence in EWD's revised technical proposal. EWD again responded with detailed justifications and responses. The Navy then determined that both ROSC's and EWD's technical proposals were acceptable and best and final price proposals were solicited.

From our in camera review, we do not believe that the questions posed by the Navy in the additional discussions constituted improper coaching with the intent of bringing EWD's proposal up to ROSC's level. See Systems Development Corp. and International Business Machines, B-204672, Mar. 9, 1982, 82-1 C.P.D. ¶ 218 at 27. Furthermore, even though the EWD design changes were characterized as extensive, we cannot conclude that the revised proposal constituted an improper "rewrite" of EWD's proposal. Ford Aerospace & Communications Corp., B-200672, supra. Moreover, we have recognized that technical leveling is not involved where the purpose of discussions is to ascertain what the offeror is proposing to furnish, which we believe was the case here. Logistics Systems, Inc., B-196254, June 24, 1980, 80-1 C.P.D. ¶ 442 at 12. Finally, continuing technical discussions, albeit to a lesser extent, were also held with ROSC during this period. Therefore, we do not believe that the EWD discussions constituted improper technical leveling.

One of the documents submitted to our Office in January 1986, a memorandum dated June 12, 1985, prior to reopening of discussions with EWD, does express the concern of one member of the Technical Review Committee that further discussions with EWD constituted technical leveling and that the decision to conduct further discussions was politically motivated. This same individual also wrote on August 16, 1985, in the midst of the EWD discussions, that the June decision to reopen discussions was "buckling under to other political pressures brought to bear on the problem." The "political pressures" referenced were apparently caused by EWD's protest to our Office and a congressional inquiry to the Navy about the protest.

As argued by the Navy, the comments in the memoranda are only the views of one person on the Technical Review Committee and not those of the contracting officer or the procuring activity. Moreover, even though the Navy's review and reversal of its position on conducting further discussions was motivated by EWD's protest, this does not negatively reflect on the correctness of the agency decision in this regard. In our experience, agencies often review and many times reverse their procurement judgments when protests are filed with our Office.

Moreover, as indicated above, ROSC has not protested the decision to conduct further discussions, but rather protests the content of the EWD discussions. The Technical Review Committee member was obviously concerned that technical leveling may occur if further discussions were conducted with EWD. This concern was weighed by the agency. However, while he disagreed with the decision to conduct further discussions, he did not complain that the actual content and conduct of the discussions constituted technical leveling. His summaries, documents, and notes form a significant portion of the documentation of the EWD discussions that were reviewed by our Office in determining the content of discussions and, as described above, the record indicates the discussions were conducted without improper technical leveling.

The record reveals no evidence that the Navy conveyed to EWD, either directly or indirectly, during discussions a better technical approach or ROSC's technical approach. Therefore, we do not believe improper technical transfusion occurred. Guardian Electric Manufacturing Co., 58 Comp. Gen. 119, 126-172 (1978), 78-2 C.P.D. ¶ 376.

ROSC also alleges that improper auction techniques were employed. However, the record does not indicate that any pricing aspects had been discussed with either offeror when the protest was filed; indeed, the request for best and final price proposals was the event that gave rise to the protest. The record does not demonstrate that the offerors were aware of each other's specific prices, although both speculated on this matter. The Navy denies that any of its personnel disclosed this information. Consequently, we cannot conclude that improper auctioning techniques were employed during discussions. See Kisco Co., Inc., B-216953, Mar. 22, 1985, 85-1 C.P.D. ¶ 334.

ROSC contends that the design changes made in EWD's revised proposal made that proposal a late proposal or modification. However, the rule requiring the rejection of late proposals or modifications is not applicable to "normal revisions of offers made during the conduct of negotiations by the offerors selected for discussions." FAR, § 15.412(a); Control Data Corporation and KET Inc.--Reconsideration, 61 Comp. Gen. 437 (1982), 82-1 C.P.D. ¶ 437. Since the revisions to EWD's proposal were made in

the negotiation process, they cannot form a basis for the rejection of EWD's proposal as late.

Finally, ROSC contends that the Navy's actions in this case were in violation of the purpose and intent of CICA. However, since the RFP was issued prior to March 31, 1985, CICA is not applicable to the conduct of this procurement.

The ROSC protest is denied.

Harry R. Van Cleve
Harry R. Van Cleve
General Counsel